

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ACJ, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

CRYSTAL JONES,

Respondent-Appellant,

and

ANDRE DURON NEAL,
a/k/a ANDRE DURON JAMES,

Respondent.

UNPUBLISHED

May 21, 2002

No. 234310

Wayne Circuit Court

Family Division

LC No. 00-394483

Before: Zahra, P.J., and Neff and Saad, JJ.

PER CURIAM.

Respondent mother appeals by delayed leave granted from an order terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(b)(ii), (g) and (j). We reverse and remand because, after thorough review of the record, we have the definite and firm conviction that a serious mistake was made by the trial court and because there is not clear and convincing evidence to terminate the mother's parental rights to her daughter.

The minor child was diagnosed with a sexually transmitted disease, attributable to a sexual assault. Suspicion focused on the father and a male relative. The child had been left in their care (and the care of others) while the mother went on a job interview. Medical testimony established that there had been a single incident of sexual abuse.

Testimony at the termination hearing focused on the father's physical abuse of the mother, and on the father's prior criminal conviction for criminal sexual conduct involving a minor. The mother testified that she learned of this conviction in early October 2000, but that the father told her that, as a teenager, he became involved with a girl who claimed to be sixteen years old and that the girl's parents pressed charges against him. The mother did not feel that her

child was endangered by this revelation, and continued to live with the father until October 13, 2000. Petitioner, however, took the position that the mother endangered her child by continuing to live with the father after learning of his conviction.

The relationship between the father and the mother was described as “off and on.” The father did not physically abuse the child, but pushed the mother ten or twenty times. The father hit the mother on October 13, 2000, whereupon she left him and later called the police to report the incident.

The mother and the child moved into a home “without lights,” so the mother’s sister offered to take the child while the mother sought more suitable housing. Thus, on October 15 or 16, 2000, the child moved in with her aunt. Evidence of a sexually transmitted disease was discovered that night, and the next day the aunt took the child to the hospital. The mother did not accompany her because she was not nearby and did not have transportation. Nonetheless, when the aunt returned to the hospital a few days later for further treatment, the mother accompanied her.

Protective Services conducted what can only be described as a cursory investigation. The Protective Services worker discussed the case by telephone with the mother, but did not meet with her and did not view the living conditions. A treatment plan was never developed, and no efforts were made to improve the mother’s parenting skills.

The court terminated the parental rights of both the father and the mother under various statutory grounds. Although not specified by the court, the parties agree that the mother’s parental rights were terminated under MCL 712A.19b(3)(b)(ii), (g) and (j):

(3) The court may terminate a parent's parental rights to a child if the court finds, *by clear and convincing evidence*, 1 or more of the following:

* * *

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

* * *

(ii) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

* * *

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent. [Emphasis added.]

The court¹ based its ruling on its determination that the mother was in “total denial” about her daughter’s assault and that, as a result, the child would be in danger if returned to the mother. Those conclusions were based on the following testimony at trial:

Q. How do you think your child got gonorrhea?

A. Um, I can go by – I can just go by what the doctor said.

Q. Well, what do you think – forget what the doctor said. Do you have any idea how that could’ve happened?

A. I just went to the doctor earlier and Andre – I mean he was my partner; and his cousin was the other person that was around in the household; so if anybody did it, it had to be between those two.

Q. Alright, you’re – you’re saying you had sexual relations with Andre Neal?

A. Yes.

Q. From Labor Day through October 13th, is that correct?

A. Seldomly.

Q. Seldomly – well did you have sexual contact?

A. Yes.

Q. Did – you had intercourse?

A. Yes.

Q. I know it’s a personal question, but I’m asking this for a reason. Did – did your – did Andre use a condom?

A. No.

Q. Did you ever get tested for gonorrhea or other illnesses?

A. I’ve been to the doctor since our last contact, and I also – I went this morning and got – I asked them for a gonorrhea test, and they told me I was negative.

¹ It should be noted that a referee took testimony during the termination hearing and made the disputed findings and recommendation.

- Q. Okay. And you say there was another individual in the home – a cousin?
- A. Yes.
- Q. And what is his name?
- A. Talence Neal.
- Q. And he was around your child the time when you were not there, is that correct?
- A. Yes.
- Q. So you don't know how your child got the gonorrhea do you?
- A. No.
- Q. You don't think Andre Neal did it do you?
- A. No.
- Q. You don't think this other cousin did it do you?
- A. I don't – I don't believe, I mean, he's just not top notch – no – no.

A statutory ground for termination must be established by clear and convincing evidence. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1993). We review the trial court's findings for clear error. MCR 5.974(I); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). The finding that the mother was in "total denial" is clearly erroneous. That finding led the court to erroneously conclude that the child would be in danger if returned to the mother. Any prediction about the child's future is speculative because there was no clear and convincing evidence that the mother failed to protect the child and no evidence that the mother would fail to protect the child in the future.

Although the father had a prior conviction for criminal sexual conduct, this does not establish that he assaulted the child. Indeed, the circumstances appear to negate his involvement because there is no evidence that he had a sexually transmitted disease or that he transmitted such a disease to the mother. Under the circumstances, the mother's expression of doubt about the father's involvement in a sexual assault was based on a reasonable interpretation of the facts and does not represent a "total denial."

Moreover, there simply is no evidence to show that the mother knew or should have known of the single incident of sexual abuse of her child before she terminated her living arrangement with the father. Ample testimony established that the mother was not aware of the assault until after her sister noticed the vaginal discharge and took the child to the hospital. Indeed, both the mother and her sister testified that the mother was surprised about this revelation and the Protective Services worker testified that this was consistent with the mother's prior statements. While an emergency room note indicates that someone observed a vaginal discharge on that date, no evidence shows that the child complained of vaginal pain or that the

mother was aware of *any* medical problem with the child until her aunt took her to the hospital the next week. This is supported by the medical expert's testimony: if the incident occurred on October, 13, symptoms of gonorrhea would not develop for until three or four days after the sexual contact. The expert also testified that there was no evidence of prior or repeated sexual contact and the record clearly shows that, on the purported date of the sexual assault, the mother removed the child from the home.

Regarding the suspected involvement of the father's relative, Talence Neal, no proofs were offered about his background or to establish that he had a sexually transmitted disease. Suspicion focused on him because the child screamed when he was around, but the medical proofs suggested that there was a single act of sexual penetration, so the child's screams were not confirmation that prior assaults had occurred. Clearly the child was sexually assaulted, but it is not clear who the perpetrator was or, more importantly, whether the mother could have done anything to protect the child from this hideous act.

The petition in this matter was based on a single, isolated incident. No attempt was made to determine whether the child would remain at risk if reunited with the mother. Thus, the court's conclusion that the child would be endangered if returned to the mother is speculative at best. *In re Hulbert*, 186 Mich App 600, 605; 465 NW2d 36 (1990). The record also reflects that the mother has ended her relationship with the father. The mother's sister testified that the mother was living with a cousin and the Protective Services worker testified that, as of October 2000, the mother stated, and it was his "understanding," that the mother no longer had a relationship with the father. There is no evidence that respondent has or plans to rekindle her relationship with the father or his family.

We further note that, though certainly not conclusive on the issues before us, it is nonetheless instructive that the lawyer/guardian ad litem for the child, whose job it is to protect and represent the interests of the child, takes the position that it is not in the best interests of the minor to terminate the mother's parental rights.

"A parent's interest in the custody of her child and in the parent-child relationship is a fundamental right." *In re AH*, 245 Mich App 77, 83; 627 NW2d 33 (2001), citing, among others, *MLB v SLJ*, 519 US 102, 116-119; 117 S Ct 555; 136 L Ed 2d 473 (1996). The very serious decision to divest a parent of this fundamental right must be based on clear and convincing evidence and the evidence in this case clearly falls short. This case involves an appalling, single assault by a person yet to be determined. The record indicates that the mother learned about the incident after the fact and after she already removed the child from the home. To terminate the mother's parental rights on the basis of this incident would be drastically premature, based on a record that offers no indication that the child might be exposed to future harm. Moreover, to dispose of this matter when no agency representative met with the mother or investigated her living conditions and when the mother had no opportunity to comply with a parenting plan is, quite simply, improper.

The court clearly erred in finding that the statutory grounds for termination were clearly and convincingly established. Accordingly, we reverse the order permanently terminating the mother's parental rights and remand for formulation of a parent-agency agreement.

Reversed and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Janet T. Neff

/s/ Henry William Saad